No. 82-1273

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF MAINE,
Petitioner

V.

RICHARD THORNTON,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPRFME JUDICIAL COURT OF THE
STATE OF MAINE

BRIEF FOR PETITIONER

JAMES E. TIERNEY
Attorney General

JAMES W. BRANNIGAN,JR.
Deputy Attorney General

DAVID W. CROOK
District Attorney

ROBERT S. FRANK
Assistant Attorney General

WAYNE S. MOSS
Assistant Attorney General
Criminal Division
State House Station 6
Augusta,Maine 04333
(207) 289-2146
Counsel of Record
for Petitioner

DONNA L. ZEEGERS
Doyle & Nelson
P.O. Box 2709
One Community Drive
Augusta,Maine 04330
(207) 622-6126
Counsel of Record
for Respondent

QUESTION PRESENTED

Whether the Maine Supreme Judicial Court correctly construed the Fourth Amendment by holding that the "open fields" doctrine of Hester v. United States, 265 U.S. 57 (1924), was inapplicable to the instant case - wherein police officers warrantlessly entered a heavily wooded area of Mr. Thornton's 38-acre rural property - just because No Trespassing and No Hunting signs, an old stone wall, and an old barbed wire fence dot the perimeter of Mr. Thornton's property and because Mr. Thornton chose a secluded location in his woods to cultivate his marijuana.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — PAGE(S)

CASES PAGE(S)

CASES — PAGE(S)

CONSTITUTIONS, STATUTES & RULES

QUESTION PRESENTED

Whether the Maine Supreme Judicial Court correctly construed the Fourth Amendment by holding that the "open fields" doctrine of Hester v. United States, 265 U.S. 57 (1924), was inapplicable to the instant case - wherein police officers warrantlessly entered a heavily wooded area of Mr. Thornton's 38-acre rural property - just because No Trespassing and No Hunting signs, an old stone wall, and an old barbed wire fence dot the perimeter of Mr. Thornton's property and because Mr. Thornton chose a secluded location in his woods to cultivate his marijuana.

OPINIONS BELOW

The citation to the opinion of the Supreme Judicial Court of Maine in State of Maine v. Richard Thornton is State v. Thornton, 453 A.2d 489 (Me. 1982). This opinion is also reproduced in the appendix of the State of Maine's printed Petition for a Writ of Certiorari at pages A1 to A26.

The Maine Superior Court suppression order is reproduced in the appendix of the printed petition at pages B1 to B8.

JURISDICTION

Petitioner invokes the jurisdiction of the Supreme Court of the United States pursuant to 28 U.S.C. § 1257(3).

The opinion and judgment of the Supreme Judicial Court of Maine in State v. Thornton, 453 A.2d 489 (Me. 1982), was entered on December 6, 1982, and the

Court's mandate issued on the same day. The State of Maine's Petition for a Writ of Certiorari was timely filed on January 31, 1983, within the sixty-day filing period set forth in U.S.Sup.Ct. Rule 20.1.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On the basis of an informant's tip that marijuana was growing in a heavily wooded area behind a mobile home on the Davis Corner Road in Hartland, Maine (J.A. 27-28, 73-74), Maine State Trooper Crandall and Hartland Constable Hartford drove to the mobile home on the morning of August 3, 1981. (J.A. 45). They parked their automobile in front of the mobile home (J.A. 36), and walked between the mobile home[1] and a house occupied by one Leavitt to the heavily wooded area immediately behind the two residences. (J.A. 28, 32-33, 58, 64-65, 73-74 (Trooper

---

1 The names of the occupants are not in the record, but the mobile home was occupied by an elderly couple and not the Respondent. (J.A. 30-31).

Crandall); 121-22 (Constable Hartford)). They then followed a footpath, crossing a broken down stone wall,[2] into the heavily wooded area until they came across a clearing where marijuana plants were growing in two patches. (J.A. 29, 33-34, 38, 58, 73-74 (Trooper Crandall); 86, 91-92 (Linda Thornton); 121-22 (Constable Hartford); State v. Thornton, 453 A.2d at 492; Pet. App. A10). Each patch was enclosed by chicken-wire fencing, over and through which the marijuana plants were visible. (J.A. 29, 48 (Crandall); 94-98, 114 (Linda Thornton); see also J.A. 7). Trooper Crandall suspected that the marijuana patches

---

[2] Respondent Thornton's wife testified that in addition to the old stone wall there were a few No Trespassing-No Hunting signs also on the perimeter of the Thornton property, but the officers did not see them. (J.A. 90-93 (Linda Thornton); 36-37, 80 (Crandall); 122 (Hartford)).

were on property owned by Respondent Richard Thornton ("Thornton"). (J.A. 37-38). However, the patches were some 500 feet from the Thornton house and because of the density of the woods were not visible from the house, the adjoining driveway, the public road or any neighboring property. (J.A. 34-36, 47, 72 (Crandall); 84-89, 95, 113, 115 (Linda Thornton)).

Upon observing the marijuana patches, the officers retraced their route back to their automobile. (J.A. 62, 65).

Thereafter Trooper Crandall went directly to the town office in Hartland where he was able to confirm that the marijuana patches indeed were located on Thornton's property. (J.A. 39-40). After securing a search warrant for which the probable cause was established at least in part by the

officers' warrantless observation of the marijuana plants on Thornton's land, Trooper Crandall along with several other law enforcement officers returned to the woods that same day, August 3rd,[3] and seized the plants (J.A. 102-05, 36, 65, 69, 76-77; R. 1).

On August 11, 1981, Respondent Thornton was charged by complaint with unlawfully furnishing Schedule Z drugs in violation of 17-A Maine Revised Statutes Annotated (M.R.S.A.) § 1106. (J.A. 14-15). Prior to

---

3 Both the Maine Superior Court and Supreme Judicial Court erred in stating that the officers' warrantless entry into Thornton's woods occurred on July 31, 1981. (Pet. App. B2, B4 (Superior Court); Thornton, 453 A.2d at 491-92; Pet. App. A2-A5). The informant spotted the marijuana patches on July 31, 1981 (J.A. 6), but the officers' warrantless visit occurred in fact on August 3, 1981 - the same day that Trooper Crandall applied for, received, and executed the search warrant. See J.A. 6, 9 (Affidavit and Request for Search Warrant); 26, 40, 102-07 (suppression hearing transcript).

trial, a Maine Superior Court Justice granted Thornton's motion to suppress for use as evidence the seized marijuana and the police officers' observations thereof because the officers had not obtained a search warrant before their initial entry onto Thornton's property on August 3rd.[4] (Pet. App. B3-B8).

On appeal to the Supreme Judicial Court of Maine, Petitioner contended that the viability of the "open fields" doctrine of Hester v. United States, 265 U.S. 57 (1924), has not been diminished by Katz v. United States, 389 U.S. 347 (1967), and that Hester's "open fields" doctrine

---

[4] Both at the outset of the suppression hearing and in closing argument the State's Attorney consistently maintained that under the "open fields" doctrine of Hester v. United States, 265 U.S. 57 (1924), the protections of the Fourth Amendment did not apply to Respondent's woods. (J.A. 24-24A, 123-24, 134-36).

permitted the August 3rd warrantless entry into the wooded area beyond the curtilage of Thornton's house, because Thornton lacked a reasonable expectation of privacy in his woods. Although acknowledging Hester's continuing viability, the Maine Supreme Judicial Court affirmed the suppression order on the ground that Fourth Amendment protections applied to Respondent's woods surrounding his marijuana patches and that the officers' August 3rd warrantless entry into the woods did not fit within any of the exceptions to the Fourth Amendment's warrant requirement. State v. Thornton, 453 A.2d 489, 493-96 (Me. 1982); Pet. App. A11-A26.

SUMMARY OF ARGUMENT

In context of the modern framework for determining the Fourth Amendment's

applicability under Katz v. United States, 389 U.S. 347 (1967), the "open fields" doctrine of Hester v. United States, 265 U.S. 57 (1924), should be a bright-line rule that any subjective expectation of privacy in an open field or wooded area - even one that is fenced, posted, and secluded - is unreasonable per se. Pursuant to this "bright-line," Hester's "open fields" doctrine should be applied to the instant case.

A. This Court has referred to Hester approvingly in both Katz and its progeny but has not yet defined the scope of the "open fields" doctrine in terms of Katz's "reasonable expectation of privacy" test. Pursuant to Katz, there are several reasons why Fourth Amendment protections should not extend to open fields or wooded areas, even those that are fenced, posted, and secluded.

First, by ruling in Katz that the Fourth Amendment's reach cannot turn upon the presence or absence of a physical trespass, this Court reaffirmed the Hester holding that Fourth Amendment protections do not become applicable simply because an officer commits an intentional trespass onto fenced land. Hence, under Katz, any subjective expectation of privacy manifested by fences and No Trespassing signs does not become reasonable for Fourth Amendment purposes simply because an officer must thereby commit an intentional trespass to enter the property.

Second, unlike Katz's enclosed telephone booth, open fields and wooded areas - even those that are fenced and posted - are not the types of places where human relations or activities creating the need for privacy ordinarily take place. Any

subjective expectation of privacy in fields or woods is therefore objectively unreasonable and not entitled to Fourth Amendment protection. Hester is in accord, holding that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields." Hester, 265 U.S. at 59. It makes no difference that an activity or object concealed in the fields or woods might be hidden from public view because fields and woods are still outside the realm of human expectations of privacy.

The conclusion that any subjective expectation of privacy in open fields or wooded areas is unreasonable per se is bolstered by the realities of modern-day surveillance. No person conducting an activity outdoors on or above the surface

of the ground, no matter how secluded the outdoor area, can have any reasonable expectation that his activity will remain free from aerial observation. Yet, aerial observation, particularly of fenced, posted, and secluded areas, has consistently been held not to invade an expectation of privacy protected by the Fourth Amendment.

Third, the inconsistency on very similar sets of facts between the Sixth Circuit's decision in United States v. Oliver, 686 F.2d 356 (1982), and the Maine Supreme Judicial Court's decision in State v. Thornton, 453 A.2d 489 (Me. 1982), illustrates the need for a "bright line" concerning the applicability of Hester's "open fields" doctrine in the wake of Katz. Drawing the "bright line" to exclude any subjective expectation of privacy in

fields or woods - even those that are fenced, posted, and secluded - from being objectively reasonable not only is consistent with this Court's decisions in Hester and Katz but also gives clear guidance to courts, police, and individual citizens concerning the scope of Hester's "open fields" doctrine in the wake of Katz.

B. The foregoing analysis discredits the two prerequisites which the Maine Supreme Judicial Court set for the applicability of the "open fields" doctrine - that (1) the officers be lawfully on Respondent's land and (2) Thornton's cultivation of marijuana be conducted openly. Applying Hester's "open fields" doctrine as a bright-line rule to the facts in this case can only result in the conclusion that Thornton's subjective expectation of privacy in his fenced and posted woods

was unreasonable and that the officers' observations of his marijuana patches were outside the scope of his Fourth Amendment protection.

ARGUMENT

I. THE "OPEN FIELDS" DOCTRINE OF HESTER V. UNITED STATES, 265 U.S. 57 (1924), IS DIRECTLY APPLICABLE TO THE INSTANT CASE.

In State v. Thornton, 453 A.2d 489 (Me. 1982), the Maine Supreme Judicial Court held that Respondent Thornton had a reasonable expectation of privacy in his rural woods surrounding his marijuana patches and was therefore entitled to Fourth Amendment protection there pursuant to Katz v. United States, 389 U.S. 347 (1967). The Maine Court reasoned that Thornton had a subjective expectation of privacy as evidenced by

the posting of his property, his choice of a secluded location for his marijuana patches which were observable only from his land, and Thornton's practice of excluding trespassers (Thornton, 453 A.2d at 494; Pet. App. A18), and asserted without further explanation that this subjective expectation of privacy was objectively reasonable (453 A.2d at 495, 496; Pet. App. A19, A25).

Although the Maine Court found that the "open fields" doctrine of Hester v. United States, 265 U.S. 57 (1924), "remains entirely intact" after Katz, it nevertheless concluded that Hester did not apply to the officers' warrantless entry into Thornton's woods. The reason was that the two prerequisites which the Court set for the applicability of the "open fields" doctrine,

viz., that the activity be openly conducted and the police be legally at their vantage point,[5] had not been met here.

---

5 The Maine Court prefaced these two prerequisites with the statement that "[i]n Maine, for the 'open fields' doctrine to apply, two factual aspects of the circumstances must be considered..." (Thornton, 453 A.2d at 495; Pet. App. A21), suggesting the possibility that the Maine Court was interpreting a Maine version of the "open fields" doctrine pursuant to state constitutional law wholly independent of the federal Fourth Amendment. However, as authority for its two "Maine" prerequisites for the applicability of the "open fields" doctrine, the Maine Court cited State v. Peakes, 440 A.2d 350 (Me. 1982), State v. Dow, 392 A.2d 532 (Me. 1978), and State v. Stone, 294 A.2d 683 (Me. 1972). All three of these cases - Peakes, Dow, and Stone - involve the scope of federal Fourth Amendment protection, especially in the wake of Katz v. United States, 389 U.S. 347 (1967), and do not cite or purport to interpret in any way the state constitutional provision on search and seizure (Me. Const. art. I, section 5). Moreover, the Thornton decision itself, like Peakes, Dow, and Stone, is concerned with the scope of federal Fourth Amendment protection under Katz and does not cite or discuss the state constitution. Hence, there is no foundation for a claim that the Maine Supreme Judicial Court's decision in

Thornton, 453 A.2d at 495-96; Pet. App. A20-A26.

Petitioner agrees with the Maine Court that Hester is still good law.[6] However, Petitioner contends that in the context of modern Fourth Amendment analysis Hester should stand for the proposition that any subjective expectation of privacy in an open field or wooded area - even one that is fenced, posted, and secluded - is per se unreasonable and, therefore, that the Maine Court's two prerequisites for applying the "open fields" doctrine are inappropriate. In light of Katz there are good reasons for viewing Hester as setting

---

5 cont. Thornton is based on an adequate state ground independent of the federal question presented for review in this case. See Texas v. Brown, 51 U.S.L.W. 4361, 4362 n.1 (U.S. Apr. 19, 1983).

6 See infra p.20, n. 7 and accompanying text.

forth such a per se rule. Pursuant to this "bright Line," Hester's "open fields" doctrine should be applied to the instant case.

A. In terms of Katz, Hester represents a per se rule that any subjective expectation of privacy in open fields or wooded areas is unreasonble.

In Katz v. United States, 389 U.S. 347 (1967), this Court articulated the standard for determining the applicability of Fourth Amendment protections, namely, whether government action has invaded an expectation of privacy upon which a person justifiably relied. Katz, 389 U.S. at 353. Pursuant to Katz, the Supreme Court in subsequent decisions "uniformly has held that the application of the Fourth amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reason-

able,' or a 'legitimate expectation of privacy' that has been invaded by a government action." Smith v. Maryland, 442 U.S. 735, 740 (1979) (citations omitted), quoted in United States v. Knotts, 103 S.Ct. 1081, 1085 (1983). As articulated by Justice Harlan in his Katz concurrence, application of this standard involves a two-fold inquiry: (1) whether a person has "exhibited an actual (subjective) expectation of privacy," and (2) whether that expectation is "one that society is prepared to recognize as 'reasonable.'" 389 U.S. at 361 (Harlan, J., concurring). A majority of this Court has since adopted Justice Harlan's formula for applying the Katz standard. See Smith v. Maryland, 442 U.S. 735, 740 (1979), quoted in United States v. Knotts, 103 S.Ct. 1081, 1085 (1983).

While this Court has referred approvingly to Hester v. United States, 265 U.S. 57 (1924), in Katz and its progeny,[7] the Court has not yet squarely addressed the scope of Hester's "open fields" doctrine in terms of Katz's "reasonable expectation of privacy" test. In asking this Court to integrate Hester with Katz, Petitioner contends that the Hester decision is consistent with and fully justified by modern Fourth Amendment analysis and represents a per se rule that any subjective expectation of privacy in an open field or wooded area - even one that is fenced,

---

[7] See United States v. Knotts, 103 S.Ct. 1081, 1086, 1087 (1983); Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978); G.M. Leasing Corp. v. United States, 429 U.S. 338, 352 (1977); United States v. Santana, 427 U.S. 38, 42 (1976); Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861, 865-66 (1974); Cady v. Dombrowski, 413 U.S. 433, 450 (1973); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 393 n.6 (1971).

posted, and concealed from the public - is objectively unreasonable for purposes of Fourth Amendment protection.

The facts on which the Hester decision was based provide the starting point for analysis. There, Gosnell and King, two federal revenue officers, while driving by the Hester house on information that illicitly distilled whiskey was on the premises, noticed a car stop in the public road in front of the house and a boy named Henderson get out of the car and go to the house while his mother stayed in the car. The officers drove past the Henderson car to a turn in the road, where, once out of view, Gosnell got out of the officers' car and entered the pine trees beside the road. (Transcript of Record at 15, 21,

Hester v. United States, 265 U.S. 57 (1924)).[8] Approaching the Hester house through the woods, Gosnell climbed over a fence and entered a pasture. (Transcript of Record at 16, 19, 20). The fence put Gosnell on notice that he may have been coming onto Hester's father's land and thereby committing a trespass. (Transcript of Record at 19).

Just after crossing the fence, at a distance of approximately 50 to 75 or 100 yards from the Hester house, Gosnell observed Charlie Hester hand a bottle of what appeared to be illicitly distilled whiskey to Henderson. (Transcript of Record at 16,

---

[8] The "Transcript of Record" in the Hester case, filed March 9, 1923, was apparently the equivalent then to what is now the Joint Appendix under U.S.Sup.Ct. Rule 30.

19, 20). Henderson's mother then gave an alarm, causing Hester and Henderson to flee with Gosnell in pursuit. (Transcript of Record at 16-17). About 200 yards from the Hester house, Hester and Henderson discarded the whiskey jug and bottle they had been carrying. Gosnell examined each and determined that both the jug and bottle contained illicitly distilled whiskey. (Transcript of Record at 17-18). Gosnell thought these examinations took place on Hester land. (Transcript of Record at 20). Meanwhile, Gosnell's companion, Officer King, discovered by the side of the Hester house a recently broken jar that also contained illicitly distilled whiskey. (Transcript of Record at 21-22).

Hester contended that the officers' warrantless entry onto his father's land and subsequent observations, pursuit, and

examination of the jug, bottle, and jar constituted a trespass and therefore an illegal search and seizure under the Fourth Amendment. Rejecting his argument, this Court stated:

> It is obvious that, even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure. The defendant's own acts, and those of his associates, disclosed the jug, the jar, and the bottle; and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned.... The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, the special protection accorded by the Fourth Amendment to the people in their "persons,

> houses, papers, and effects" is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Com. 223, 225, 226.

Hester, 265 U.S. at 58-59. Hence, Hester stands for the proposition that a police officer's knowing and intentional trespass onto fenced property outside the home[9] falls outside the scope of the Fourth Amendment.[10]

---

[9] For the last half-century - since Olmstead v. United States, 277 U.S. 438, 466 (1928) - Hester's "open fields" doctrine has meant that the open area beyond the "curtilage" of a house is not subject to Fourth Amendment protection. See, e.g., United States ex rel. Saiken v. Bensinger, 546 F.2d 1292 (7th Cir. 1976), cert. denied, 431 U.S. 930 (1977); Care v. United States, 231 F.2d 22 (10th Cir. 1956); Skipper v. State, 387 So.2d 261 (Ala. App. 1980).

[10] Significantly, Hester handed the bottle to Henderson after the officers' car passed by the Hester house and out of sight so that Hester had a subjective expectation that the transaction would not be observed by the officers from the public road. Hester, like Thornton in the instant case,

The Court's decision in Katz, while reformulating the analytical framework under which Hester and other cases concerning the applicability of the Fourth Amendment were decided, did not eviscerate Hester's "open fields" doctrine. On the contrary, Hester's "open fields" doctrine, including its application to fields or wooded areas that are fenced, posted, and secluded, is logically compelled by the reasoning in Katz. There are two reasons why this is so.

First, in Katz this Court reaffirmed the Hester holding that the interest protected by the Fourth Amendment is not

---

10 cont. also had a subjective expectation of privacy that the officers would not commit an illegal trespass onto his father's land to gain a different vantage point. In terms of Katz's modern framework for determining the Fourth Amendment's applicability, the Hester Court in effect found this latter subjective expectation of privacy to be unreasonable.

equivalent to the property interest protected by local trespass laws. The Court stated that "the Fourth Amendment protects people, not places." Katz, 389 U.S. at 351. Indeed, overruling the holding in Olmstead v. United States, 277 U.S. 438 (1928), that the Fourth Amendment could not be violated in the absence of a physical trespass, this Court stated that the Fourth Amendment's reach "cannot turn upon the presence or absence of a physical intrusion into any given enclosure." Katz, 389 U.S. at 353. Subsequent decisions of this Court have been consistent in adhering to this principle. See United States v. Knotts, 103 S.Ct. 1081, 1087 (1983) ("Just as notions of physical trespass based on the law of real property were not dispositive in Katz, supra, neither were they dispositive in Hester v. United States, 265 U.S. 57

(1924)."); Rakas v. Illinois, 439 U.S. 128, 143-44 n.12 (1978); United States v. Santana, 427 U.S. 38, 42 (1976); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 393 n.6 (1971) ("[W]e have in some instances rejected Fourth Amendment claims despite facts demonstrating that federal agents were acting in violation of local [property] law. ... Hester v. United States, 265 U.S. 57 (1924) ('open fields' doctrine)"); Id. at 393-94 ("[O]ur recent decisions regarding electronic surveillance have made it clear beyond peradventure that the Fourth Amendment is not tied to the niceties of local trespass laws. Katz v. United States, 389 U.S. 347 (1967)...."); Id. at 394 ("The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by

the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile."). In view of Hester and also Katz and its progeny, the Maine Supreme Judicial Court was clearly wrong in making "the lawfulness of the officers' presence" (Thornton, 453 A.2d at 495; Pet. App. A21) a prerequisite to the application of the "open fields" doctrine.

Because the intentional nature of the trespass does not create Fourth Amendment rights, it makes no difference under either Hester or Katz that the land on which an officer intentionally trespasses is fenced and posted. The purpose of posting a field or woods is to put an individual on notice that he is about to trespass onto private property against the owner's will, and the purpose of placing a fence around the

perimeter of a field or wooded area is to give the same kind of notice, to mark a property boundary line, to keep farm animals within the property or wild animals without, or to discourage people from entering the property. In view of the notice provided by No Trespassing signs and fences, a police officer who enters onto fenced and posted property commits an intentional trespass. However, by ruling in Katz that the Fourth Amendment's reach cannot turn upon the presence or absence of a physical trespass, this Court reaffirmed the Hester holding that Fourth Amendment protections do not become applicable simply because an officer commits an intentional trespass. Thus, in terms of Katz, Hester means that any subjective expectation of privacy manifested by fences and No Trespassing signs does not become reasonable

for Fourth Amendment purposes simply because an officer must thereby commit an intentional trespass to enter the property.

This point is supported by the facts in Hester itself. Hester's father's land was fenced. In fact it was the fence which put Officer Gosnell on notice that upon entering the pasture he may have been coming onto Hester land (Transcript of Record at 19, Hester), and it was only after climbing over the fence and thereby committing an intentional trespass that Gosnell observed Hester hand the bottle of whiskey to Henderson (Transcript of Record at 16, 19, 20, Hester). Yet, this Court found no Fourth Amendment violations.

A second reason why Hester's "open fields" doctrine is logically compelled by Katz concerns the relationship of an open

field or wooded area to human activity. Unlike Katz's enclosed telephone booth, open fields and wooded areas are not places where human relations or activities creating the need for privacy ordinarily take place. See United States v. Oliver, 686 F.2d 356, 360 (6th Cir. 1982) (en banc). This much is suggested by the majority opinion in Katz which accepted and noted what appeared to be common ground between the parties in that case that, on the basis of Hester, an open field is outside the reach of the Fourth Amendment. Katz, 389 U.S. at 351 n.8. Moreover, Justice Harlan in his concurring opinion, which has become the formula by which Katz is applied,[11] indicated that any subjective expectation

---

[11] See supra p. 19 .

of privacy in an open field is unreasonable per se, stating:

> I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, Weeks v. United States, 232 U.S. 383 (1914), and unlike a field, Hester v. United States, 265 U.S. 57 (1924), a person has a constitutionally protected reasonable expectation of privacy....

389 U.S. at 360 (Harlan, J., concurring).

Justice Harlan additionally stated:

> Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances

> would be unreasonable. Cf. Hester v. United States, supra.

389 U.S. at 361 (Harlan, J., concurring). Fencing and posting a field or wooded area merely manifest a subjective expectation of privacy and do not change the basic premise that a field or wooded area is not a place where human communications, relationships, and activities demanding privacy occur. To expect such privacy there is unreasonable. Decisions of both federal and state courts since Katz have so held. See United States v. Oliver, 686 F.2d 356 (6th Cir. 1982) (en banc) (Hester viable in the wake of Katz; "open fields" doctrine applied to fenced and posted fields); United States v. Williams, 581 F.2d 451 (5th Cir. 1978) (Hester cited as still being good law even though Katz "has done away with outmoded property concepts"; "open fields" doctrine

applied where agents stepped over "dilapidated hogpen fence" on their way to a shed); United States ex rel. Saiken v. Bensinger, 546 F.2d 1292 (7th Cir. 1976), cert. denied, 431 U.S. 930 (1977) (Hester viable; fenced goosehouse 400 feet from house was outside curtilage; 14.5-acre portion of 20-acre farm, "all of which was surrounded by a fence," was "clearly open fields"); Ford v. State, 264 Ark. 141, 569 S.W.2d 105 (1978), cert. denied, 441 U.S. 947 (1979) ("open fields" doctrine viable and applied to field which was fenced, posted, and had a locked gate); Giddens v. State, 156 Ga. App. 258, 274 S.E.2d 595 (1980), cert. denied, 450 U.S. 1026 (1981) (Hester viable in the wake of Katz; "open fields" doctrine applied to field surrounded by barbed wire fence; "We do not believe that any expectation of privacy

defendant had in regard to this field was reasonable under these circumstances." (156 Ga. App. at 259, 274 S.E.2d at 597)); State v. Cemper, 209 Neb. 376, 307 N.W.2d 820 (1981) ("straight-forward application of Hester and the open fields doctrine was still proper" in the wake of Katz (209 Neb. at 380, 307 N.W.2d at 822); "open fields" doctrine applied to cornfield enclosed by a barbed wire fence and entered through an open gate; defendant had no legitimate expectation of privacy); Commonwealth v. Janek, 242 Pa. Super. Ct. 340, 363 A.2d 1299 (1976) (Hester not overruled by Katz; "open fields" doctrine applied to field posted at regular intervals and surrounded by barbed wire fences and high banks).

The framers recognized that open fields and wooded areas are generally outside the realm of human expectations of privacy by

expressly limiting the Fourth Amendment's protection against unreasonable searches and seizures to persons, houses, papers, and effects. The Hester decision is in accord, holding that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields." Hester, 265 U.S. at 59. By conditioning the Fourth Amendment's applicability upon objectively reasonable expectations of privacy, Katz perpetuates Hester's "open fields" doctrine as a per se rule that any subjective expectations of privacy in an open field or wooded area are, as a matter of law, unreasonable. See United States v. Knotts, 103 S.Ct. 1081, 1085-86 (1983) ("[N]o such [traditional] expectation of privacy extended... to movements of objects such as the drum of

chloroform outside the cabin in the 'open fields.' Hester v. United States, 265 U.S. 57 (1924)"). Under this rule, Thornton's subjective expectation of privacy manifested by the fencing and posting of his wooded area is no more reasonable for purposes of Fourth Amendment protection than was Charlie Hester's subjective expectation of privacy inherent in his father's property interest in his father's fenced land.[12]

Since there can be no reasonable expectation of privacy in open fields or

---

[12] It is immaterial that Respondent cultivated the marijuana in his rural woods rather than in "open fields." Bedell v. State, 257 Ark. 895, 521 S.W.2d 200, 201 (1975); Cornman v. State, 156 Ind. App. 112, 294 N.E.2d 812, 816-17 (1973); see also United States v. Hare, 589 F.2d 242, 243 (5th Cir. 1979); Sesson v. State, 563 S.W.2d 799 (Tenn. 1978). Woods as well as fields are not a setting for lawful human activities demanding privacy, and there can therefore be no objectively reasonable expectation of privacy in either place.

wooded areas, it makes no difference for Fourth Amendment purposes that an activity or object concealed in the fields or woods might be hidden from public view. The Fourth Amendment is still inapplicable. This point was articulated by the Wisconsin Supreme Court in Conrad v. State, 63 Wis.2d 616, 218 N.W.2d 252 (1974), as follows:

> Under the "open fields" doctrine, the fact that evidence is concealed or hidden is immaterial. The area [the open field] is simply not within the protection of the Fourth Amendment. If the field where the body was found does not have constitutional protection, the fact that the sheriff, rather than observing the evidence that might have been in plain view, dug into the earth to find the body and committed a trespass in so doing does not confer protection.

63 Wis.2d at 625, 218 N.W.2d at 257. See also United States v. Brown, 473 F.2d 952 (5th Cir. 1973) (Hester's "open fields" doctrine applied where F.B.I. agents found suitcase only by digging two to three inches below the ground surface of farmland adjacent to a chicken coop); People v. Lashmett, 71 Ill. App. 3d 429, 389 N.E.2d 888 (1979), cert. denied, 444 U.S. 1081 (1980) (Hester's "open fields" doctrine applied even though tractor, located about 100 to 125 yards from dwelling house, could not be seen plainly from adjacent public ways and sheriff had to climb over two fences to get to the tractor to determine its serial number); State v. Cemper, 209 Neb. 376, 307 N.W.2d 820 (1981) (Hester's "open fields" doctrine applied even though growing marijuana was not visible from the borders of the property, from the buildings

on the property, nor from any location outside the cornfield due to the height of the growing corn). Hence, the Maine Supreme Judicial Court's statement in Thornton that the other prerequisite for applying Hester's "open fields" doctrine is "the openness with which the activity is pursued" (Thornton, 453 A.2d at 495; Pet. App. A21) likewise is wrong.

The conclusion that any subjective expectation of privacy in open fields or wooded areas is unreasonable per se is bolstered by the realities of modern-day surveillance. No person conducting an activity outdoors on or above the surface of the ground, no matter how secluded the outdoor area, can have any reasonable expectation that his activity will be protected from aerial observation. Yet, aerial observation, particularly of fenced,

posted, and secluded areas, has consistently been held not to invade an expectation of privacy protected by the Fourth Amendment. E.g., United States v. Allen, 633 F.2d 1282, 1289-90 (9th Cir. 1980) (aerial observation of posted ranch with gate across main access road), cert. denied, 454 U.S. 833 (1981); United States v. Mullinex, 508 F. Supp. 512 (E.D. Ky. 1980) (aerial observation of a posted farm with limited physical access); United States v. DeBacker, 493 F. Supp. 1078 (W.D. Mich. 1980) (aerial observation of fields within fenced and posted farm); People v. Superior Court, 37 Cal. App. 3d 836, 112 Cal. Rptr. 764 (1974) (aerial observation of fenced backyard behind a home); Dean v. Superior Court, 35 Cal. App. 3d 112, 110 Cal. Rptr. 585 (1973) (aerial observation of field surrounded by forest); State v.

Stachler, 58 Hawaii 412, 570 P.2d 1323 (1977) (aerial observation of small marijuana patch located 15 feet from house in isolated area accessible only by passing through locked gate and over unimproved road); People v. Lashmett, 71 Ill. App. 3d 429, 389 N.E.2d 888 (1979) (aerial observation of fenced farmyard), cert. denied, 444 U.S. 1081 (1980); State v. Davis, 51 Or. App. 827, 627 P.2d 492 (1981) (aerial observation of posted property with locked gate across driveway in secluded, wooded area); see also United States v. Knotts, 103 S.Ct. 1081, 1086 (1983) ("Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case"). But see People v. Sneed, 32 Cal. App. 3d 535, 108 Cal.

Rptr. 146 (1973) (helicopter hovering 20 to 30 feet above backyard of house was unreasonable governmental intrusion).

The conclusion that any expectation of privacy in open fields or woods is unreasonable per se puts into perspective Petitioner's initial contention that trespass by police officers is immaterial to application of Fourth Amendment protections. For if a person has a subjective expectation of privacy it is reasonable or unreasonable before the police ever arrive on the scene, and the subsequent actions of the police officers, including an intentional trespass, cannot convert an objectively unreasonable expectation of privacy into one that is reasonable. This Court made precisely this point in the recent case of United States v. Knotts, 103 S.Ct.

1081, 1086, 1087 (1983), where, citing Hester, it held that an unreasonable expectation of privacy for travel visible from public places was not rendered reasonable by a trespassing beeper disclosing the same activity. Likewise, an unreasonable expectation of privacy for activity in open fields or woods, which is visible from the air, is not rendered reasonable by the intentional trespass of an officer who discovers that activity.

A third reason for giving full effect to Hester's "open fields" doctrine in the wake of Katz is the advantage of having a "bright line." This Court recently has drawn several "bright lines" in the law of search and seizure in order to give specific guidance to courts, police, and individual citizens concerning the scope of Fourth Amendment protections. United

States v. Ross, 102 S.Ct. 2157 (1982) (pursuant to automobile exception to warrant requirement, police can open and search any container in the vehicle that might contain the sought-after item); New York v. Belton, 453 U.S. 454 (1981) (a search incident to arrest of an occupant of a vehicle can extend through the entire passenger compartment of the vehicle, including any locked or unlocked containers). A bright-line rule concerning the applicability of Hester in light of Katz will spare courts and the police the difficult task of making case-by-case determinations on recurring fact situations where, in the absence of such a bright line, there has been and undoubtedly will continue to be great inconsistency among the decisions. Both cases now before this Court, the instant one and the Oliver case,

underscore the problem - nearly identical facts but different results.

Correspondingly, law enforcement officers can hardly perform their duties, often done in rapidly developing circumstances, when the lawfulness of their observations may vary with the presence and quality of fencing on a property, the presence, number, and location of No Trespassing signs on the property, the existence of a practice of excluding trespassers, and the availability and nature of state laws governing posting and trespass. As noted by the Sixth Circuit in Oliver, such case-by-case determinations could lead to the incongruous result that the applicability of Fourth Amendment protection might well depend on the direction from which the police accomplish their search. For example, the Fourth Amendment could

apply if the police pass No Trespassing signs and a locked gate in making their search. If, however, they make the search by helicopter, or on the ground but from another direction where there are no signs and an open gate, there may be found no reasonable expectation of privacy and therefore no Fourth Amendment protections. See United States v. Oliver, 686 F.2d at 360 n.4.

In New York v. Belton, 453 U.S. 454 (1981), this Court stated, "When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." 453 U.S. at 459-60. The bright-line rule here advocated, viz., that any subjective expectation of privacy in

fields or woods - even those that are fenced, posted, and secluded - is unreasonable per se, gives clear guidance to courts, police, and individual citizens concerning the applicability of Hester's "open fields" doctrine in the wake of Katz to open, undeveloped, and rural areas.

B. The Maine Supreme Judicial Court erred in holding that Respondent Thornton had a reasonable expectation of privacy in his fenced and posted woods surrounding his secluded marijuana patches.

The Maine Supreme Judicial Court erred in holding that Fourth Amendment protection attached to Thornton's rural woods. The primary source of this error was the Court's requiring two prerequisites for the applicability of Hester's "open fields" doctrine - that (1) the officers be

lawfully on Respondents's land and (2) Thornton's cultivation of marijuana be conducted openly (Thornton, 453 A.2d at 495; Pet. App. A21). The first prerequisite is discredited by Hester itself and this Court's decisions from Katz to Knotts, and the second concerns only whether there is a subjective expectation of privacy, not its reasonableness. Given the kinds of human activities that ordinarily occur in open fields, rural woods, and outdoor areas in general, a subjective expectation manifested by conducting an activity outdoors in a secluded location is not "one that society is prepared to recognize as 'reasonable.'" Katz, 389 U.S. at 361 (Harlan, J., concurring). Therefore, it is not entitled to Fourth Amendment protection and does not preclude application of the "open fields" doctrine.

Applying Hester's "open fields" doctrine as a bright-line rule to the facts in this case can only result in the conclusion that Thornton's subjective expectation of privacy in his fenced and posted woods was unreasonable and that the officers' observations of his marijuana patches were outside the scope of his Fourth Amendment protection. The patches themselves were located about 500 feet from the Thornton house in a small clearing in rural woods (J.A. 35-36 (Crandall)), and in their warrantless visit to the patches the officers never came near the house. Therefore, neither a warrant nor probable cause was necessary to make these observations, and the opinion of the Maine Supreme Judicial Court holding to the

contrary should be reversed.[13]

---

13 The applicability of Hester's "open fields" doctrine to the facts of the instant case depends on whether Respondent Thornton's Fourth Amendment rights extend to his rural woods. Unfortunately, the courts below mistook to a great extent exactly what they were deciding and imposed the burden of proof on the State to show that the officers' warrantless visit to Thornton's woods fell within one of the exceptions to the warrant requirement. (J.A. 24-25; Pet. App. B3 (Maine Superior Court); Thornton, 453 A.2d 492 n.2; Pet. App. A6 n.2; see also 453 A.2d at 495; Pet. App. A19 (quoting State v. Crider, 341 A.2d 1, 5 (Me. 1975)), where Maine Supreme Judicial Court erroneously placed burden of proof on State to show that Thornton's expectation of privacy in his woods was unreasonable). Pursuant to Rakas v. Illinois, 439 U.S. 128, 130 n.1 (1978), however, the initial burden should have been on Thornton to establish a legitimate expectation of privacy in his woods, especially since the State's Attorney at the outset of the hearing on Thornton's motion to suppress claimed that the Fourth Amendment was inapplicable to the instant case (J.A. 24-24A) and never departed from that position (J.A. 123-24, 134-36).

The Maine Supreme Judicial Court also noted that since the State's Attorney acquiesced in the Suppression Hearing Justice's placement of the burden on the State to prove an exception to the warrant requirement, the State must have either conceded or waived "the issue of the occurrence of a search." Thornton, 453 A.2d at 493 n.3; Pet. App. A12 n.3. However, the

---

13 cont. burden of going forward with evidence (J.A. 25), never deviated from his initial position that Trooper Crandall and Constable Hartford conducted "a permissible open field type of search" into an area where Respondent had no reasonable expectation of privacy and no Fourth Amendment rights. (J.A. 123-24, 134-36 (closing argument)). Hence, the State never conceded or waived the "standing" issue, raised by the State's Attorney at the outset of the hearing (J.A. 24-24A), that the Fourth Amendment did not apply to the officers' warrantless visit to Thornton's property.

CONCLUSION

The judgment of the Supreme Judicial Court of Maine in State of Maine v. Richard Thornton, 453 A.2d 489 (Me. 1982), should be reversed.

Respectfully submitted.

JAMES E. TIERNEY
Attorney General

WAYNE S. MOSS
Assistant Attorney General
Criminal Division
Appellate Section
State House Station 6
Augusta, Maine 04333
(207) 289-2146
Counsel of Record for Petitioner

CERTIFICATE OF SERVICE PURSUANT TO
U.S.SUP.CT. RULES 28.5(b) AND 35.7

I, Wayne S. Moss, Counsel of Record for Petitioner State of Maine and a member of the Bar of the Supreme Court of the United States, hereby certify that pursuant to U.S.Sup.Ct. Rule 28.3 I have caused three (3) copies of the State of Maine's "Brief for Petitioner" and "Joint Appendix" to be served on each other party to this proceeding by depositing said copies in a United States Post Office, with first-class postage prepaid, addressed to Counsel of Record for each party as follows:

Donna L. Zeegers, Esquire
DOYLE & NELSON
P. O. Box 2709
One Community Drive
Augusta, Maine 04330
Counsel of Record for Richard Thornton

Frank E. Haddad, Jr.
529 Kentucky Home Life Building
Louisville, Kentucky 40202
Counsel of Record for Petitioner
Ray E. Oliver in Oliver v. United States, No. 82-15

The Honorable Rex E. Lee
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530
Counsel of Record for Respondent
United States in Oliver v. United States, No. 82-15

Dated at Augusta, Maine, this 23rd day of May, 1983.

WAYNE S. MOSS
Assistant Attorney General
Criminal Division
State House Station 6
Augusta, Maine 04333
Counsel of Record for
Petitioner